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SUPREME COURT, U. S.

No. 73-424

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In the Supreme Court of the United States

ELIZABETH J. RUSSELL, individually and as representative of All Capital Investment Service customers,

Petitioner,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

QUESTIONS PRESENTED

The petition presents two questions, only the first of which was passed upon below.

(1) Whether petitioner has standing to maintain an action for damages for an alleged violation of §§ 16 and 21 of the Glass-Steagall Act (12 U.S.C., §§ 24 and 378).

(2) Whether the service provided by respondent Bank in managing separate accounts with brokerage houses in the name of each customer constituted a mutual investment fund in violation of the Glass-Steagall Act.

The case also presents the question, raised by respondent, but not decided by the courts below, whether the amount in controversy satisfies the $10,000 Federal jurisdictional requirement.

If respondent prevails on any one of these three issues, the judgment below must be affirmed.

STATUTES INVOLVED

§§ 16 and 21 of the Glass-Steagall Act (12 U.S.C. §§ 24 and 378) are quoted at pp. 2-3 of the petition. 28 USC §1331(a) limits the jurisdiction of the district courts to civil actions wherein the matter exceeds $10,000 in value.

STATEMENT OF THE CASE

In view of the inaccuracy and insufficiency of the Statement of the Case in the petition for certiorari, the facts are briefly restated here.

Beginning in 1968 and 1969 the respondent bank instituted and advertised a "Capital Investment Service", inaccurately described in the petition as a "fund". During the period here in question the Service operated as follows:

Each customer of the Capital Investment Service executed an agreement with the bank, which agreement specified in detail the rights and obligations of the respective parties. (The agreement executed by petitioner on April 3, 1969 appears at pages A20-24 of the Petition.) Under the terms of that agreement, each customer authorized the bank

to open a separate brokerage account for that customer with a specific brokerage house (in plaintiff's instance the broker is and has been Merrill Lynch, Pierce, Fenner & Smith.) Each such brokerage account was in the name of the individual customer. The customer paid the brokerage fees and the bank merely acted as an agent in selecting investments for each customer's account. Securities were bought, sold, and held without commingling for each account on behalf of the individual customer who owned the account, although it was understood that the bank might buy or sell the same securities at the same time for all accounts.* Dividends and interest received upon such securities belong to the individual customer, and are, at the customer's option, either distributed to him or reinvested for his account.**

The customer or the bank was and is free to terminate the arrangement at any time. The contract provided (Pet. A23):

> "Upon termination of this agreement, Merrill Lynch, Pierce, Fenner & Smith will continue to hold the securities and cash in the account which I [petitioner]

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* The brochure advertising the Service (Exhibit 1 to plaintiff's memorandum opposing defendant's motion to dismiss, App. below p. 111) stated, *inter alia*:

> "We maintain a standard portfolio of stocks for all the investors who choose our Capital Investment Service. Securities are purchased or sold at the same time for all accounts, without consideration by us of federal tax or other individual circumstances of investors. In this way we keep our cost to a minimum and are able to offer our advising services to persons with as little as $20,000 to invest."

** Since May 12, 1970, customers have selected their own investments and their own brokers; prior thereto the bank was empowered by the customer to exercise its own discretion as to investments and brokers, but since that date the bank's Service has been advisory only. (App. below, pp. 13, 37, 41).

> have established with them, but all of your [bank's] rights and obligations as agent for the investment of the account shall terminate."

Thus, in the event of such termination, the cash and securities in the customer's brokerage account remain with the broker in that account, until such time as the customer instructs the broker otherwise as to further handling of the account.

Petitioner delivered $20,000 to the bank for investment pursuant to the above arrangement. (Pet. A-20.) Other persons similarly invested $7,500,000. (Pet. A-11.)

Petitioner's complaint alleged that Capital Investment Service constituted a "mutual investment fund" in violation of the provisions of the Glass-Steagall Act as construed by this Court in *Investment Company Institute* v. *Camp,* 401 U.S. 617 (1971), decided shortly before the complaint was filed. The complaint also alleged that the Service invested customer funds in Penn Central stock, *inter alia,* including 45 shares costing $2,464.81 bought for petitioner, that this stock declined drastically in value (Pet. A-12), and that the bank's investments in all securities for the customers of its Capital Investment Service had declined in value by approximately $2,000,000 (Pet. A-14), or approximately 27% of the total. If the petitioner's loss was proportionately the same, it would have amounted to 27% of $20,000, or $5,400. Thus, whether measured by petitioner's loss in Penn Central, or by the general decline in all of petitioner's investment, petitioner's loss was substantially under the $10,000 jurisdictional amount.

Plaintiff makes no claim of mismanagement of funds; indeed, as the court below pointed out (Pet. A-3),

plaintiff "expressly disavowed any theory of recovery except her claim that §§ 16 and 21 of the Glass-Steagall Act have been violated". (See App. below, p. 77.) Thus no issue as to mismanagement of funds is presented.

Respondent moved to dismiss the complaint (App. below, pp. 64-66) upon three grounds, any one of which would have been sufficient:

1. There is no private right of action for damages arising from violation of the Glass-Steagall Act.

2. On the undisputed facts, respondent's Capital Investment Service did not constitute a mutual fund and therefore did not violate that Act.

3. The amount in controversy was insufficient to satisfy the jurisdictional minimum of $10,000.

The District Court granted the motion to dismiss on the ground that plaintiff was not within the class of those within the statutory purpose "that Congress sought to protect." (App. below, pp. 125-126.) The Court of Appeals affirmed on the same ground.

ARGUMENT

This case presents no conflict of decisions or novel question of importance, but an application by the courts below of principles as to standing long recognized in the decisions of this Court. In addition, it is clear as a matter of law that the complaint was dismissible because the amount involved was insufficient to satisfy Federal jurisdictional requirements and because of lack of substantive merit apart from the matter of standing.

1. The court below properly held that the participants in the Service were not members of the class for whose benefit the Glass-Steagall provisions in issue here were enacted, and that "to allow them to recover damages resulting from nothing more than a decline in value of a prudently managed fund simply because the fund itself was created or operated in violation of §§ 16 and 21 of the Glass-Steagall Act would impair the precise interests that the statute was enacted to protect." * (Pet. A-7.)

This principle, enunciated years ago in *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33 (1916), has been recognized in the recent decisions holding that standing requires both that there be "injury in fact" and that the injury affect "an interest arguably within the zone of interests to be protected or regulated" by the statute claimed to have been violated. *United States* v. *Students Challenging Reg-*

* To allow recovery of the entire amount invested by all participants in Continental's Capital Investment Service, as prayed in the complaint, would be even more unjustifiably harmful to the interests of bank depositors and stockholders.

ulatory Agency Procedures, 93 S. Ct. 2405, 2415 (1973); *Sierra Club* v. *Morton,* 405 U.S. 727, 733 (1972); *Data Processing Service* v. *Camp,* 397 U.S. 150, 153 (1970).

The Glass-Steagall restrictions on banks did not reflect a concern that banks could not capably provide the same type of service as mutual funds or that the customers of such services needed special protection from such activities, but a design not to jeopardize the overriding interest of bank depositors and the public in preserving the solvency of the banks themselves. (See opinion below, A5-A6 and excerpts from *Investment Company Institute* v. *Camp,* 401 U.S. 617, quoted therein.) Here there is no claim that petitioner's investment losses were a result of the fact that her investments were administered by a bank.

Moreover, with particular respect to the National Banking Act, "it has been held repeatedly by this court that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties. *National Bank* v. *Matthews,* 98 U.S. 621; *National Bank* v. *Whitney,* 103 U.S. 99; *National Bank of Xenia* v. *Stewart,* 107 U.S. 676." *Thompson* v. *St. Nicholas National Bank,* 146 U.S. 240, 251 (1892). And more recent decisions have similarly interpreted the Glass-Steagall Act as not "indicating an intention to depart from the principle of those cases, or to make such transactions subject to attack by persons other than the Government." *Noel Estate, Inc.* v. *Commercial National Bank in Shreveport,* 232 F.2d 483, 485 (5th Cir. 1956); *Blaney* v. *Florida National Bank at Orlando,* 357 F. 2d 27 (5th Cir. 1966). Thus a private litigant may not collect damages from a bank mere-

ly because it has acted *ultra vires*. This serves the salutary purpose of protecting the bank and its depositors against claims, such as petitioner's, in which the injury asserted did not result from the fact that the bank was acting beyond its powers.

The *Investment Company* and *Data Processing* cases, as well as *Arnold Tours* v. *Camp*, 400 U.S. 45 (1970), do not hold that private persons have standing to sue national banks for injuries resulting from the bank's supposed violations of the National Banking Act. Those cases hold only that private persons in competition with national banks, aggrieved by administrative regulations expansively interpreting the powers of national banks, have standing under the Administrative Procedure Act to challenge the administrative regulations which authorized national banks to compete with them and thereby caused them injury.

The position of petitioner here is not comparable, both because she is not among those intended to be protected and because, in contrast to the competitor cases, no injury attributable to the statutory violation can be shown. And this private suit for damages cannot and, of course, does not rest upon the Administrative Procedure Act.

2. There is no substance to petitioner's claim that the service performed by the bank here is the equivalent of a mutual investment fund, found unauthorized in the *Investment Company* case. The controlling fact there was that the investors received certificates of ownership (which in substance were found to be securities) in a single commingled fund administered by the bank. These certificates represented units which were transferable in themselves and separate from the underlying securities purchased by the fund. The underlying securities were not owned by the

individual investors. In this case, however, there is no commingling of funds or accounts. Each investor owns the securities held in a separate account by the brokerage house for him. He may terminate the management agreement at any time, and if he does, the brokerage account and the securities in it still belong to him.

The investor thus does not own a proportionate share of a common pooled fund, which was a principal factor causing the arrangement in the *Investment Company* case to be treated as a mutual fund. The fact that respondent bank here purchases securities of the same issue simultaneously for a number of separate accounts owned by different investors does not show that the investors are buying securities in a single fund. Indeed, the *Investment Company* opinion makes clear that for a bank merely "to act as a managing agent for individual customers, or to purchase stock for the account of its customers" is not unlawful. (401 U.S. at 625.)

The complaint here, filed 18 days after this Court's decision in the *Investment Company* case, obviously is premised on the erroneous belief that that decision invalidates respondent's Capital Investment Service. In view of the absence of factors critical to the *Investment Company* decision, it is clear that, apart from the question of standing, petitioner has no case on the merits.

3. Petitioner's alleged loss from the decline in value of the securities in her account was approximately $5,400, which is substantially less than the $10,000 jurisdictional amount. The complaint does not allege that any other member of the class lost a larger amount.* And she cannot aggregate the alleged amount of injury to the members of

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* Hence the issue before this Court in *Zahn* v. *International Paper Company*, certiorari granted, 410 U.S. 925, is not here presented.

the class. *Snyder* v. *Harris*, 394 U.S. 332 (1969). Since the required jurisdictional amount was clearly lacking, the complaint was dismissible for that reason also.

CONCLUSION

Since no good reason for granting certiorari has been shown, the petition should be denied.

Respectfully submitted,

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